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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 115

TENNESSEE BURLEY TOBACCO GROWERS' ASSOCIATION, *et al., Petitioners,*

v.

IVAN RANGE, *et als.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TENNESSEE

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TENNESSEE BURLEY TOBACCO GROWERS' ASSOCIATION and H. S. DUNCAN, your petitioners, pray that a writ of certiorari issue to review the judgment of the Court of Appeals of Tennessee, entered in the above-entitled case on August 24, 1955, review of which was finally denied by the Supreme Court of Tennessee on February 8, 1957.

OPINIONS BELOW

The opinion of the Chancellor of the Chancery Court for Greene County, Tennessee (Appendix A(1), pp. A-1-A9)* is not reported.

The opinion of the Court of Appeals of Tennessee (Appendix A(2), pp. A9-A23) is reported at 298 S.W. 2d 545. The opinion of the Court of Appeals of Tennessee on rehearing (Appendix A(3), pp. A23-A26) is reported at 298 S.W. 2d 554.

The opinions of the Supreme Court of Tennessee denying a petition for certiorari (Appendix A(4), pp. A27-A36), denying a petition for rehearing (Appendix A(5), pp. A36-A40), and granting leave to file but denying a second petition for rehearing (Appendix A(6), pp. A40-A42) have not yet been reported.

JURISDICTION

1. The decree of the Court of Appeals of Tennessee which is sought to be reviewed here (Appendix B(2), pp. A51-A52), was entered on August 24, 1955.

2. The judgment of the Supreme Court of Tennessee granting leave to file but denying the second petition for rehearing of the denial of a petition for certiorari to review the foregoing decree of the Court of Appeals (Appendix B(5), p. A54) was entered on February 15, 1957.

3. The judgment of the Tennessee Court of Appeals did not become final until the petition for certiorari to the Supreme Court of Tennessee had been finally disposed of by the latter court. See Tenn. Code, 1956, § 16-411. The Tennessee Court of Appeals was

* All of the Appendices are being presented under a separate cover, as permitted by Rule 23(1)(i).

accordingly the highest court of the state in which decision could be had. See *Fisher* v. *Whitton*, 317 U.S. 217, determined by this Court on writ of certiorari to the Tennessee Court of Appeals after the Supreme Court of Tennessee had denied a petition for certiorari.

4. Since the Supreme Court of Tennessee entertained and acted upon the second petition for rehearing, the judgment sought to be reviewed did not become final until such second petition for rehearing was denied. See *Gypsy Oil Co.* v. *Escoe*, 275 U.S. 498, 499; *Pfister* v. *Northern Illinois Finance Corp.*, 317 U.S. 144, 149-150; *Bowman* v. *Loperena*, 311 U.S. 262, 266; *Wayne United Gas Co.* v. *Owens-Illinois Glass Co.*, 300 U.S. 131, 137-138.

5. The federal question was raised as indicated at pp. 7-8, *infra*. The excerpts from the record showing the raising of the federal question are set out in Appendix C, pp. A54-A61.

6. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

The corporate petitioner, a marketing co-operative, made contracts with Commodity Credit Corporation, a federal corporation, to carry out the federal price support program for tobacco, which contracts provided in pertinent part that—

> "All net gains accruing from the sale of tobacco upon which Commodity has loaned funds under this agreement shall be distributed on a fair and equitable basis to growers by the Association unless a disposition of such gains other than by distribution to such growers is requested by the Association and approved by Commodity."

The question presented is whether the direction in the foregoing federal contracts that the net gains "shall be distributed" requires the cooperative as a matter of federal law to make a distribution in cash.

STATUTES INVOLVED

The statutes involved are set forth in Appendix D, pp. A61-A63.

STATEMENT

In the present posture of this case, the pertinent facts can be succinctly stated.

Petitioner Tennessee Burley Tobacco Growers' Association, hereinafter called Tennessee Burley, is a non-profit association organized on August 25, 1941 under the cooperative marketing laws of the State of Tennessee (Public Acts of Tennessee, 1923, c. 100; Tenn. Code, 1932, §§ 3784-3830; now Tenn. Code, 1956, §§ 43-1801 to 43-1849) and now has over 76,000 members; while petitioner H. S. Duncan is the Secretary-Treasurer and General Manager of Tennessee Burley.

Tennessee Burley for many years administered the tobacco crop loan support program under the Agricultural Adjustment Act of 1938, as amended, and under cognate legislation (7 U.S.C. §§ 1301-1315, 1391, 1421-1441), under contracts with Commodity Credit Corporation. Commodity Credit Corporation, originally a Delaware Corporation, but at all times a federal instrumentality, was incorporated by Congress in 1948 by the Commodity Credit Corporation Charter Act, now 15 U.S.C. §§ 714-714*o*. Tennessee Burley, by reason of its contracts with Commodity Credit Corporation, hereinafter called simply CCC, did administer the tobacco loan program for all Tennessee

growers of Burley tobacco for the years 1946 to 1949, inclusive.

It was not until the close of 1952 that Tennessee Burley completed marketing all of these crops. After paying the amounts due on the loans of the CCC and all expenses incident to marketing the tobacco, there remained a substantial net gain. It is agreed by all parties that the beneficial interest in that net gain is in the growers whose crops were thus sold.

Tennessee Burley proposed to use part of the net gain for the erection of a tobacco re-drying plant and possible other plant facilities.

Respondents, 11 members and alleged members out of the more than 76,000 members of Tennessee Burley, brought the present proceeding as a purported class suit to correct alleged mismanagement, to enjoin the building of the re-drying plant, and to force the distribution of all of the net gain attributable to the contracts with CCC in ratable cash payments to the members and growers concerned. There was ample evidence in the record, summarized and set forth in the opinions of the Court of Appeals (Appendix, pp. A16, A24-A25), showing that warehousemen and warehouse interests instigated and offered to finance the litigation.

As the several opinions in Appendix A (pp. A1-A42) show, respondents were not permitted to maintain the proceeding as a class action, and failed to establish waste or mismanagement. The only issue open, and the only one raised by the present petition, concerns the duty of Tennessee Burley under its contracts with CCC, with particular reference to the provision of each such annual contract which reads:

"All net gains accruing from the sale of tobacco upon which Commodity has loaned funds under this agreement shall be distributed on a fair and equitable basis to growers by the Association unless a disposition of such gains other than by distribution to such growers is requested by the Association and approved by Commodity."

The eleven respondents contend that the word "distributed" in the above contracts between Tennessee Burley and CCC means a distribution in cash, and that, since admittedly no cash has been paid, no distribution has ever taken place.

Petitioner Tennessee Burley's view is that the word "distribution", as used in the frame of reference of cooperative activities over many years, was regarded as meaning, and does mean, "distribution, either in cash or in non-cash forms." It accordingly allocated the equity of each member upon its books with notice to each member of such allocation, and with notice to CCC of such action.

Much of the evidence at the trial concerned the meaning of the word "distributed" as used in the quoted contract, and most of the witnesses, including the individual who was Solicitor of the Department of Agriculture during part of the period involved and who in that capacity passed on the problem (Tr. 2552 *et seq.*), agreed with Tennessee Burley.

On that state of the record, the Chancellor proceeded (Appendix A(1), p. A5) "to decide the case upon the equities and the justice" thereof. He then decreed a distribution in cash to such of the growers, including the 11 respondents, as wanted their equities so paid to them, and referred the case to the Clerk & Master to conduct a referendum by mail to determine which

of the farmers and growers desired to have their funds paid in cash, and which desired to have their funds left with Tennessee Burley. Appendix B(1), pp. A42-A51.

On appeal, the Tennessee Court of Appeals held that Congress intended the tobacco growers to be the prime beneficiaries of the federal program, that the obligation of Tennessee Burley "was to act for the benefit of growers" without regard to their membership in a cooperative, and that, since many growers were not members of Tennessee Burley, the quoted provision meant distribution in cash. The Court of Appeals regarded as immaterial the circumstance, documented below (pp. 11-12), that after CCC in 1954 had announced in the Federal Register that its tobacco contracts would require that all proceeds "shall be distributed in cash," it amended the requirement to delete the words "in cash". The Court of Appeals accordingly affirmed the Chancellor's decree insofar as it provided for payment to the respondents. Appendix B(2), pp. A51-A52.

The Supreme Court of Tennessee denied a petition for certiorari to review the foregoing holding, and, as has been indicated, denied a rehearing and entertained, and wrote an opinion denying, a second petition for rehearing of its denial of certiorari (Appendix A(6), pp. A41-A42).

HOW THE FEDERAL QUESTION WAS RAISED

1. Respondents' complaint in par. III thereof (Tr. 11; Appendix C, p. A54) set up the Tennessee Burley's contract with CCC, and alleged that this contract required payment to the farmer in cash. Respondents' amended complaint (Tr. 2113 et seq.; Appendix C, pp. A55-A56) elaborated these allegations.

2. Petitioners' demurrer to the amendment to the bill set forth in par. III thereof (Tr. 2126-2127; Appendix C, pp. A56-A57) that distribution in Tennessee Burley's contract with CCC did not mean distribution in cash.

3. Petitioners' answer to the amendment to the bill set forth at some length (Tr. 2128-2134; Appendix C, pp. A57-A61) their views as to the proper construction of the contract with CCC.

4. All of the opinions rendered in this case (Appendix A, pp. A1-A42) deal with the interpretation of Tennessee Burley's contract with CCC.

REASONS FOR GRANTING THE WRIT

The courts below have circumscribed and perhaps seriously crippled the operations of a cooperative marketing association, and have cast a cloud on the future of all such associations, not as a matter of state law or of state public policy, but in consequence of their interpretation of a federal contract. Since, plainly, the meaning of such a contract cannot properly vary from state to state, and since, as we point out below, the contract in question affects many hundred of thousands of individuals concerned in the marketing of tobacco, an activity that Congress has found to constitute "one of the great basic industries of the United States with ramifying activities which directly affect interstate and foreign commerce at every point" (7 U.S.C. § 1311(a); Appendix D, p. A62), review by this Court is called for to determine whether there is any such federal limitation on the operations of marketing cooperatives as the Tennessee courts profess to have found.

1. Plainly, the provision in the corporate petitioner's contract with Commodity Credit Corporation on which the present controversy turns, and which the courts below construed, is part of a federal contract. "In determining the meaning and effect of contracts to which the United States is a party, the governing rules of law must be finally declared by this Court." *S.R.A. v. Minnesota*, 327 U.S. 558, 564. "The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any state." *United States v. County of Allegheny*, 322 U.S. 174, 183. The meaning of the disputed provision, therefore, does not and cannot depend on Tennessee law. And, since decision at each level below (see opinions, Appendix A, pp. A1-A42) turned on the meaning of the federal contract, the case plainly was not rested on any non-federal ground.

2. It is of the essence of the agricultural cooperative movement, some of whose earlier conflicts with hostile warehouse interests in the field of tobacco marketing were recorded in *Liberty Warehouse Co. v. Burley Tobacco Ass'n*, 276 U.S. 71, and in *State of Tennessee v. Burley Tobacco Growers' Ass'n*, 2 Tenn. App. 674 (see Waldauer, *The Tobacco Growers Association Case*, 5 Tenn. L. Rev. 123), that a portion of the net gains derived from cooperative operations be retained as a capital fund to finance further activities. As a federal judge in Tennessee put the matter more than twenty years ago, dismissing a suit to compel distribution of a fund paid to a cooperative under the original Agricultural Adjustment Act (*Van Dyke v. Mid-South*

Cotton Growers Ass'n, 12 F. Supp. 138 (W. D. Tenn.), at 139), "reserves were and are essential to the continued existence and operation of nonstock, nonprofit co-operative associations." Indeed, one of the fundamental principles of agricultural cooperation, as expressed in an official publication of the United States Department of Agriculture, is "Limited Returns on Capital". See Fetrow, *Three Principles of Agricultural Cooperation*, Farm Credit Administration Circular E-24 (1950 reprint). A corollary proposition is that cooperatives are conceded to have the right—in order to function—to use their retained capital as a revolving fund to finance their activities. See Hanna, *The Law of Cooperative Marketing Associations*, § 136; Nieman, *Revolving Capital in Stock Cooperative Corporations*, 13 L. & Contemp. Probs. 393, 395-396; Packel, *The Law of Cooperatives* (3d ed. 1956) §§ 45(d), 52.

Distribution to the members of an agricultural cooperative is accordingly effected by assigning to such members an equity representing their ratable share of the net gains of the enterprise, and this practice is so widespread that the retained equities in farm cooperatives throughout the country now aggregate nearly two billion dollars. The exact 1954 figure was $1,808,861,000. See Griffin *et al., Farmers' Equities in Their Marketing and Farm Supply Cooperatives, 1954* (General Report 27, Farmer Cooperative Service, U. S. Department of Agriculture, August 1956).

Such an assignment of equities, credited to the individual farmer on the books of the association, is taxable to him as income when so assigned. *George Bradshaw*, 14 T.C. 162; *Harbor Plywood Corporation*, 14 T.C. 158, 161, affirmed 187 F. 2d 734 (C.A. 9). Other-

wise stated; it is a distribution of economic interest sufficient to entail tax liability.

3. Commodity Credit Corporation's actual course of dealing emphasizes the soundness of petitioners' views here.

(a) If, as the courts below held, cash distribution was what CCC's contract called for, then obviously CCC should and would have insisted on performance of that contract accordingly. But the voluminous record in this case fails utterly to show that CCC at any time either asked or required Tennessee Burley to make a cash distribution of the net gains accruing from the tobacco support program. However much CCC may have hedged and hesitated about pronouncing a formal written ruling, CCC's actions were consistent only with the view that distribution by assignment of equities complied with the terms of its contract with Tennessee Burley.

(b) The regulations for the 1954 tobacco loan program, as originally promulgated, provided in pertinent part (19 Fed. Reg. 3542, 3543; § 464.605, *Interest rate, recourse, and distribution of net gains*) that—

> "After all of the tobacco of one crop year pledged for loan by an association is marketed and the loan fully paid, any net gains will be distributed *in cash* by the association to the producers unless other disposition is approved by CCC." [Italics added.]

Significantly enough, the foregoing portion of § 464.605 was formally amended less than two months later by deleting the words "in cash." 19 Fed. Reg. 4661. That amendment, accordingly, removed any

federal barrier to the normal and usual functioning of tobacco marketing cooperatives.

(c) The comparable provision in the regulations for the 1955 tobacco loan program followed almost word for word the amended 1954 version; the "in cash" phrase is conspicuously absent. See § 464.705 at 20 Fed. Reg. 3525, 3526:

> "After all of the tobacco of one crop year pledged for loan by an association is marketed and the loan fully repaid, any net gains will be distributed by the association to the producers who placed the tobacco under loan unless other disposition is approved by CCC."

(d) The 1956 regulations even more strikingly support petitioners' interpretation. They provide (21 Fed. Reg. 3863, 3864):

> "§ 464.806. *Adjustment of interest and distribution of overplus.* * * *
>
> "(a) *Definition of overplus.* 'Overplus' is the balance remaining from the sales proceeds of the loan tobacco, after deducting the amount of the loan plus all handling charges, operating costs, and interest.
>
> "(b) *Disposition of overplus.* For those associations which agree to apply one-half of the overplus to other crop year loans, the remaining one-half of the overplus shall constitute 'net gains', and for those associations which do not agree to apply one-half of the overplus to other crop year loans, the entire overplus shall constitute 'net gains', which shall be distributed by the association to the producers who placed the tobacco under loan unless other disposition is approved by CCC."

If, as the courts below held, every tobacco grower is entitled to his share of the net gains in cash, then, necessarily, no association would be able, over the protest of a single member, to apply half of its gross net gains to other crop year loans, as the foregoing plainly contemplates. Otherwise stated, CCC specifically permits what the Tennessee courts in the present case have held that CCC's own contracts prohibited.

4. The issue presented is of concern to hundreds of thousands, if not indeed millions, of individuals. The Department of Agriculture has estimated that, as of 1952-1953, four years ago, there were over ten thousand farm cooperative associations in the United States, with nearly seven and a half million members. In tobacco alone, there were then listed 28 cooperatives with a total estimated membership of 727,573. See Gessner, *Statistics of Farmer Cooperatives, 1952-53* (General Report 15, Farmer Cooperative Service, U. S. Department of Agriculture, May 1955), pp. 8-9. Thus the outcome of the present litigation will have consequences reaching far beyond the present parties. And, very plainly, the meaning of the federal contract concerned cannot be permitted to vary from state to state, as it undoubtedly would if its resolution were left to state courts without further review.

It is significant that the Tennessee cooperative marketing law, now § 43-1834 of the 1956 Tennessee Code (Appendix D, p. A61), specifically permits the cooperative to retain "proper reserves", and that this provision, then § 3816 of the 1932 Tennessee Code, was held not to require distribution in *Van Dyke* v. *Mid-South Cotton Growers Ass'n*, 12 F. Supp. 138, *supra*. It is even more significant that the result reached

below deals a crippling blow to the cooperative tobacco marketing movement at the instigation of the same warehouse interests who have bitterly opposed it for more than a generation. For if the rulings below are permitted to stand, then interests hostile to farm cooperatives can, by instigating and financing litigation, deprive cooperatives of their working capital by opening the door, as in this case, to a partial liquidation of the cooperative at the suit of a minuscule fragment of the entire membership.

If that result had been reached as a matter of state law, petitioners could not be heard to complain here. But it was reached, as the opinions below (Appendix A, pp. A1-A42) plainly show, in consequence of the Tennessee courts' construction of a federal contract.

We submit that the federal concern in the marketing of tobacco, which has been solemnly declared by Congress in 7 U.S.C. § 1311(a) (Appendix D, p. A62), calls for review by this Court of the holding below that a federal contract requires a result which is so inconsistent with the unbroken course of cooperative practice, and which is so injurious to the further development of the cooperative marketing movement.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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